BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH HARRIS	)	
Claimant	)	
	)	
VS.	)	
	)	
ROBERT E. MENEES, JR., DDS	)	
Respondent	)	Docket No. 1,011,911
	)	
AND	)	
	)	
HARTFORD CASUALTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 18, 2006 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on January 9, 2007.

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for the claimant.[1] Patricia A. Wohlford, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ declined to award claimant any benefits under the Kansas Workers Compensation Act as he concluded she failed to provide timely notice as required by K.S.A. 44-520.[2]

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[1] Elaine Eppright, Esq. is also listed as co-counsel, but she did not appear at oral argument.

[2] Although he denied claimant benefits, he nonetheless went ahead and made findings of fact relative to causation (claimant's injury was found to have been "caused or at least aggravated by her work" activities), average weekly wage ($849.97), permanent partial impairment (9 percent to the right forearm), entitlement of temporary total disability (8.57 weeks), and medical treatment (which was found to be unauthorized).

The claimant requests review of this Award. Claimant maintains the greater weight of the evidence supports her contention that she provided timely notice of her carpal tunnel condition along with its connection to her work activities. Claimant further contends the remaining findings made by the ALJ as to her date of accident, average weekly wage, temporary total disability benefits and permanency[3] should all be affirmed. As for the finding relative to her medical bills, claimant maintains respondent failed to provide treatment and as a result, her election to proceed with treatment renders her bills authorized rather than unauthorized as found by the ALJ.

Respondent argues the ALJ's award should be affirmed and the claimant denied compensation based on her failure to provide notice as required by statute. In the alternative, respondent contends claimant has failed to establish that she sustained an accidental injury occurring during her employment with respondent. Put simply, respondent maintains that by law, claimant's last date of work constitutes her "date of accident" and that in this instance, claimant's last date of work occurred in June 2003, a date *after* claimant left respondent's employ.

Independent of the foregoing arguments, respondent further argues that claimant's impairment should be modified to 5 percent, consistent with the testimony of Dr. Bene, the treating physician, and that the finding with respect to her medical bills should be affirmed as claimant directed her own treatment, failing to give respondent the opportunity to provide her care. Lastly, claimant is not entitled to any temporary total disability benefits as she was off work following her surgery for the birth of her child, something she had planned to do regardless of her surgery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in 1992 as a dental hygienist, a position that requires claimant to repetitively grasp tools while in the course of scaling and polishing her patient's teeth. Claimant is right hand dominant and as a result, she repetitively uses her right hand to perform this work. At all times pertinent to this decision claimant has worked part-time for respondent as well as for another dentist.[4] The parties concede that in the aggregate, claimant's average weekly wage was $849.97 and that 68 percent of her total wages ($578.79) was attributable to her employment with this respondent.

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[3] In her brief claimant maintained the 9 percent to the forearm assessed by the ALJ was acceptable, but to the extent the Board modifies that finding, claimant suggests the proper figure, consistent with K.S.A. 44-503a, is 7-8 percent permanent partial impairment to the right forearm.

[4] A claim was apparently made against the other dentist, but is not a part of this proceeding.

Claimant testified that she began having problems with numbness and tingling in her right hand in 1994. According to claimant, she told her employer, Dr. Menees, "I was having some problems, and I'm not sure who referred me to the Dickson-Diveley group."[5]

Claimant sought treatment from the Dickson-Diveley group, where she was apparently diagnosed with carpal tunnel and was given conservative treatment in the form of an injection and a sling for her wrist. Following this first cortisone injection, claimant's symptoms went away for a significant period of time. But as they returned, she would go back to the Dickson-Diveley clinic and undergo another injection and the symptoms would subside. Claimant testified that she would advise Dr. Menees each time of her need for injections, but never asked for him to pay for this treatment. In 2000 claimant had another flare-up of her symptoms. And when asked what else she might have told Dr. Menees of her condition in 2000, claimant testified that she doesn't recall whether she told Dr. Menees that her symptoms were due to her work-related activities.[6]

Then in December 2002, her symptoms returned. At that time she was 2 months pregnant and her obstetrician referred her to Dr. Richard J. Bene. Dr. Bene diagnosed carpal tunnel and provided her with an injection of cortisone. Claimant testified that at the time of her December 2002 flare-up she told respondent of her ongoing problems with her hand. She further testified that she also told Dr. Menees that these problems were due to her dental hygiene work activities.[7] But she did not ask respondent to provide her with treatment or to pay for Dr. Bene's bills.

On May 19, 2003, claimant's employment with respondent was terminated for unrelated reasons. Up to that point, the record indicates that claimant had apparently been performing her normal work duties without modification. But her last injection provided no lasting relief so claimant had endoscopic surgery on June 4, 2003, just before she was set to deliver her child.

Following surgery, claimant received immediate relief from the pain she had been experiencing and over time, the numbness and tingling subsided. Nonetheless, she has ongoing complaints with diminished grip strength and when she has an increase in hand-intensive activity, her symptoms will temporarily increase. Claimant has returned to her regular work activities as a dental hygienist, even working for respondent in her former capacity on a part-time basis.

Two physicians spoke to the issue of claimant's permanent partial impairment. Dr. Bene, the physician who performed the surgery, testified that 5 percent to the forearm is

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[5] Claimant's Depo. (Jan. 17, 2005) at 26.

[6] *Id.* at 32.

[7] *Id.* at 36.

generally what one would get for an operated carpal tunnel procedure with no complications.[8] Dr. J. Michael Smith examined claimant on May 5, 2004, at respondent's request, and opined claimant bore a 13 percent to the right forearm, although 70 percent of that rating was attributable to her employment with Dr. Menees and 30 percent was due to her other employment.[9] Dr. Bene expressed no opinion as to the causative aspects of claimant's carpal tunnel condition while Dr. Smith testified that claimant's condition was causally related to her carpal tunnel complaints.[10]

Dr. Robert E. Menees, Jr., testified that the claimant worked for him as a hygienist for the past 10-1/2 years. Although claimant asserts (at least at one point) that she told Dr. Menees of her condition, her need for injections and its relationship to work, Dr. Menees denied knowing of her condition before the formal claim was filed in July 2003. He testified, rather candidly, as follows:

> Gosh, I hate for this to be on the record. But there are times when Betsy [claimant] sort of gets on my nerves because of chatter, chatter, chatter. Frankly, I have this little automatic ear piece or brain piece that I turn off. She may have told the other people in the office that. She may have told Sandy that, Sandy being my ex-wife, although there is nothing in here officially. I really don't remember. That's probably my failing, but I do not remember. That's all I can tell you.[11]

Dr. Menees did not recall claimant wearing a brace on her arm, nor was he aware that she was seeing a doctor because of problems with her hands.

The ALJ concluded that claimant failed to provide respondent with timely notice as required by statute. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that

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[8] Bene Depo. at 11, 15. All references are to the 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (*Guides*) and all ratings are to the forearm.

[9] Smith Depo. at 11-12.

[10] *Id.* at 10.

[11] Menees Depo. at 9-10.

> in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

If an injured employee does not provide notice within the 10 day period, the notice period may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to "just cause".

The ALJ concluded that the claimant neither gave notice within 10 days of her accident, which he found to be May 19, 2003, her last day of work for respondent, nor did she establish "just cause" for her delay in reporting the accident in July 2003. As a result, her claim was barred by K.S.A. 44-520.

In order to determine whether the ALJ erred, we must first consider whether May 19, 2003 was the correct accident date.

In *Treaster*, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for the employer, or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[12] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

Here, the ALJ concluded that claimant's last date of work for this respondent, May 19, 2003, was the appropriate accident date under the *Berry* rationale and the Board agrees. Although it is true that claimant continued to work for another employer after leaving respondent's employ performing the same work duties, this employment was limited in duration and amounted to only a few more days of work before she left to have surgery to her hand. There is no evidence to suggest that these additional days of part-time work significantly altered claimant's physical condition. Moreover, it does not invalidate the fact that claimant sustained an injury while working for respondent. And the Board concludes that May 19, 2003 was the appropriate date of accident, her last day of work *for that respondent*.

Having found May 19, 2003 as the accident date, the Board can now consider whether claimant timely notified respondent of her work-related injury. The ALJ correctly

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[12] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

noted that claimant had to provide notice before June 3, 2003 (excluding intervening Saturdays, Sundays and holidays) or August 2, 2003, assuming there was just cause for delay. He then went on to examine the facts and concluded that claimant failed to give notice before June 3, 2003 and failed to establish "just cause" for her delay in giving notice in July 2003.

The Board has carefully considered the record and finds that the ALJ's conclusion on the issue of notice must be reversed. Claimant testified that in 2000 she was not certain that she advised respondent of the work-related nature of her ongoing carpal tunnel complaints, although she clearly knew they were related to her work activities for this and her other employer. But the transcript is clear that as of December 2002, before her legally-determined date of accident, claimant maintains she told respondent that she was again having problems and that her carpal tunnel complaints were attributable to her work duties. Although Dr. Menees quite honestly denies any such recollection, he candidly admits that he tends to "tune out" the claimant during the work day. Thus, it is difficult to find that claimant did not do as she says when her employer says he merely does not remember and admits to a propensity to ignore her during the course of the day. For this reason, the Board finds that claimant did, in fact, provide the notice of her work-related injury in December 2002. The fact that this notice came before her legally-determined date of accident is of no consequence. Claimant met the requirements of the statute and her claim is not precluded on that basis.

Having concluded that claimant sustained an accidental injury arising out of and in the course of her employment as of May 19, 2003 while in respondent's employ, the Board can now address the remaining issues of average weekly wage, permanent impairment, and claimant's entitlement to temporary total disability benefits.

As a part-time employee of at least two dentists, performing essentially the same duties in each position, claimant is entitled to aggregate her wages from each employer under K.S.A. 44-511(b)(7).[13] The parties agreed that claimant's wages from both employments totaled $849.97 and that 68 percent of that total, $578.79, was derived from her employment with respondent. However, the statute dictates that her compensation rate is based not upon the lower figure, but upon the gross average weekly wages derived from each of her employments. Thus, her compensation rate is based upon $849.97.

The proportional relationship between the employments does, however, play a part in the permanency aspect of claimant's claim. K.S.A. 44-503a provides as follows:

> Whenever an employee is engaged in multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two (2) or more employers, and such employee sustains an injury by

[13] *Kinder v. Murray & Sons Constr. Co.,* 264 Kan. 484, 957 P.2d 488 (1988).

> accident which arose out of and in the course of the multiple employment with all such employers, and which did not clearly arise out of and in the course of employment with any particular employer, all such employers shall be liable to pay a proportionate amount of the compensation payable under the workmen's compensation act as follows: Each such employer shall be liable for such proportion of the total amount of compensation which is required to be paid by all such employers, as the average gross weekly wages paid to the employee by such employer, bears to the total average gross weekly wages paid to the employee by all such employers, determined as provided in subsection (b)(7) of K.S.A. 44-511, as amended.

Here, there is no dispute that claimant was doing the same work for two dentists at the same time, working on a part-time basis for both. Although one physician has opined that there is a 70/30 contribution ratio as between those two employers (with this respondent responsible for 70 percent of the 13 percent permanent partial impairment) this finding is irrelevant as the statute dictates the respondent's relative liability for the permanency.

The ALJ found that claimant sustained a 9 percent permanent impairment. This appears to be an average of the 5 percent (Dr. Bene) and 13 percent (Dr. Smith). The Board affirms this finding and based upon this respondent's proportionate share of claimant's wages, the Board also finds that respondent is responsible for 68 percent of that 9 percent which is 6 percent. Thus, the Award is hereby modified to reflect a 6 percent permanent partial impairment to the claimant's right forearm.

As for the medical bills, the Board has concluded that claimant provided respondent with notice as required by statute. And respondent failed to provide medical treatment. Thus, the medical bills incurred by claimant and paid for by her personal health carrier are respondent's responsibility. Respondent is hereby ordered to reimburse the health carrier those bills associated with claimant's treatment and surgery relative to her carpal tunnel complaints in her right hand which were reflected in a billing statement at the regular hearing subject to the medical fee schedule.

Finally, claimant sought 8.57 weeks in temporary total disability benefits for the period from June 4, to August 4, 2003. Although it is true that claimant had originally planned to take off work in order to give birth and also planned to remain at home to care for her child, nonetheless she did have surgery. And according to Dr. Bene, 6 weeks from surgery is a reasonable[14] period for one to remain off work following such surgery. The Board affirms the ALJ's decision to grant temporary total disability benefits, but modifies the finding to award benefits for the period June 4 to July 18, 2003, a 6.43 week period.

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[14] Bene Depo. at 13.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 18, 2006, is reversed and an award is entered in favor of the claimant and against respondent and its insurance carrier as follows:

The Board finds that claimant suffered an accidental injury arising out of and in the course of her employment with respondent on May 19, 2003, and as a result is entitled to a 6 percent permanent partial disability to the right forearm.

The claimant is entitled to 6.43 weeks of temporary total disability compensation at the rate of $432.00 per week in the amount of $2,777.76 followed by 11.61 weeks of permanent partial disability compensation, at the rate of $432.00 per week, in the amount of $5,015.52 for a 6 percent loss of use of the forearm, making a total award of $7,793.28.

Respondent is also ordered to reimburse the health carrier those bills associated with claimant's treatment and surgery relative to her carpal tunnel complaints in her right hand which were reflected in a billing statement at the regular hearing.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Patricia Wohlford, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge